

(2) Any site specific matter that has been the subject of a final decision of the Federal courts;

(3) A final Corps decision that has resulted from additional analysis and evaluation, as directed by a final appeal decision;

(4) A permit denial without prejudice or a declined permit, where the controlling factor cannot be changed by the Corps decision-maker (e.g., the requirements of a binding statute, regulation, state Section 401 water quality certification, state Coastal Zone Management Act disapproval, etc. (See 33 CFR 320.4(j));

(5) A permit denial case where the applicant has subsequently modified the proposed project, because this would constitute an amended application that would require a new public interest review, rather than an appeal of the existing record and decision; or

(6) Any request for the appeal of a denied permit or a declined individual permit, where the RFA has not been received by the division engineer within 60 days of the date of the NAP.

§ 331.6 Filing an appeal.

(a) An affected party appealing a permit denial or declined permit must submit an RFA that is received by the division engineer within 60 days of the date of the NAP. A flow chart of the appeal process is shown in Appendix A.

(b) In the case where an applicant objects to a proffered individual permit, the appeal process proceeds as follows. To initiate the appeal process regarding the terms and conditions of the permit, the applicant must write a letter to the district engineer explaining his objections to the permit. The district engineer, upon evaluation of the applicant's objections, may: modify the permit to address all of the applicant's objections, or modify the permit to address some, but not all, of the applicant's objections, or not modify the permit, having determined that the permit should be issued as previously written. In the event that the district engineer agrees to modify the proffered individual permit to address all of the applicant's objections, the district engineer will issue such modified permit, enclosing an NAP form as well. Should the district engineer modify the proffered individual permit to address

some, but not all, of the applicant's objections, the district engineer will send the applicant such modified permit, an NAP form, and the decision document for the project. If the district engineer does not modify the proffered individual permit, the district engineer will offer the unmodified permit to the applicant a second time, enclosing an NAP form and a copy of the decision document. If the applicant still has objections, the applicant may decline such modified or unmodified permit; this declined individual permit may be appealed to the division engineer upon submittal of a complete RFA form. The completed RFA must be received by the division engineer within 60 days of the NAP. A flow chart of an applicant's options for a proffered individual permit is shown in Appendix B.

(c) The district engineer may not delegate his signature authority to deny the permit with prejudice, or to return an individual permit to the applicant with unresolved objections (see §§ 331.6 (b)(ii) and 331.6(b)(iii)).

(d) Affected parties may appeal permit denials or declined individual permits where the permit denial or the proffered individual permit occurs after March 9, 1999, but may not appeal permit denials or declined permits where the Corps took that action before March 9, 1999. All appeals must meet the criteria set forth in § 331.5 of this Part.

§ 331.7 Review procedures.

(a) *General.* The administrative appeal process for permit denials and declined individual permits is a one level appeal, normally to the division engineer. The appeal process will normally be conducted by the RO. The RO will document the appeal process, and assist the division engineer to make a decision on the merits of the appeal. The division engineer may participate in the appeal process as the division engineer deems appropriate. The division engineer will make the decision on the merits of the appeal, and provide any instructions, as appropriate, to the district engineer.

(b) *Requests for the appeal of permit denials or declined individual permits.* Upon

receipt of an RFA, the Corps shall review the RFA and the administrative record to determine whether the request meets the criteria for appeal. If the RFA meets the criteria for appeal, the RO will so notify the appellant in writing within 30 days of the receipt of the RFA. If the RO believes that the RFA does not meet the criteria for appeal (see § 331.5), the RO will make a recommendation on the RFA to the division engineer. If the division engineer determines that the RFA is not acceptable, the division engineer will notify the appellant of this determination by a certified letter detailing the reason(s) why the appeal failed to meet the criteria for appeal. No further administrative appeal is available, unless the appellant revises the RFA to correct the deficiencies noted in the division engineer's letter. The revised RFA must be received by the division engineer within 30 days of the date of the certified letter refusing the initial RFA. If the Corps determines that the revised RFA still fails to meet the criteria for appeal, the division engineer will notify the appellant of this determination by a certified letter within 30 days of the date of the receipt of the revised RFA, and will advise the appellant that the matter is not eligible for appeal. No further RFAs will be accepted after this point.

(c) *Site Investigations.* Within 30 days of receipt of a complete RFA, the RO should determine if a site investigation is needed to clarify the administrative record. The RO should conduct any such site investigation within 60 days of receipt of a complete RFA. The RO may also conduct a site investigation at the request of the appellant, provided the RO has determined that such an investigation would be of benefit in interpreting the administrative record. The appellant and the appellant's authorized agent(s) must be provided an opportunity to participate in any site investigation, and will be given 15 days notice of any site investigation. The RO will attempt to schedule the site investigation at the earliest practicable time acceptable to both the RO and the appellant. The site investigation should be scheduled in conjunction with the appeal review conference, where practicable. The RO, the appel-

lant, the appellant's agent(s) and the Corps district staff are authorized participants at the site investigation. The RO may also invite any other party the RO has determined to be appropriate, such as any technical experts consulted by the Corps.

(d) *Appeal Conference.* Conferences held in accordance with this rule will be informal, and will be chaired by the RO. The purpose of the appeal conference is to provide a forum that allows the participants to discuss freely all relevant issues and material facts associated with the appeal. An appeal conference will be held for every appeal of a permit denial or a declined individual permit, unless the RO and the appellant mutually agree to forego a conference. The conference will take place within 60 days of receipt of an acceptable RFA, unless the RO determines that unforeseen or unusual circumstances require scheduling the conference for a later date. The purpose of the conference will be to allow the appellant and the Corps district representatives to discuss supporting data and information on issues previously identified in the administrative record, and to allow the RO the opportunity to clarify elements of the administrative record. Presentations by the appellant and the Corps district representatives may include interpretation, clarification, or explanation of the legal, policy, and factual bases for their positions. The conference will be governed by the following guidelines:

(1) *Notification.* The RO will set a date, time, and location for the conference. The RO will notify the appellant and the Corps district office in writing within 30 days of receipt of the RFA, and not less than 15 days before the date of the conference.

(2) *Facilities.* The conference will be held at a location that has suitable facilities and that is reasonably convenient to the appellant, preferably in the proximity of the project site. Public facilities available at no expense are preferred. If a free facility is not available, the Corps will pay the cost for the facility.

(3) *Participants.* The RO, the appellant, the appellant's agent(s) and the Corps district staff are authorized participants in the conference. The RO

may also invite any other party the RO has determined to be appropriate, such as any technical experts consulted by the Corps, adjacent property owners or Federal or state agency personnel to clarify elements of the administrative record. The division engineer and/or the district engineer may attend the conference at their discretion. If the appellant or his authorized agent(s) fail to attend the appeal conference, the appeal process is terminated, unless the RO excuses the appellant for a justifiable reason. Furthermore, should the process be terminated in such a manner, the district engineer's original decision on the appealed action will be sustained.

(4) *The role of the RO.* The RO shall be in charge of conducting the conference. The RO shall open the conference with a summary of the policies and procedures for conducting the conference. The RO will conduct a fair and impartial conference, hear and fully consider all relevant issues and facts, and seek clarification of any issues of the administrative record, as needed, to allow the division engineer to make a final determination on the merits of the appeal. The RO will also be responsible for documenting the appeal conference.

(5) *Appellant rights.* The appellant, and/or the appellant's authorized agent(s), will be given a reasonable opportunity to present the appellant's views regarding the subject permit denial or declined permit.

(6) *Subject matter.* The purpose of the appeal conference will be to discuss the reasons for appeal contained in the RFA. Any material in the administrative record may be discussed during the conference, but the discussion should be focused on relevant issues needed to address the reasons for appeal contained in the RFA. The RO may question the appellant or the Corps representatives with respect to interpretation of particular issues in the record, or otherwise to clarify elements of the administrative record. Issues not identified in the administrative record by the date of the NAP for the application may not be raised or discussed, because substantive new information or project modifications would be treated as a new permit application (see § 331.5(b)(5)).

(7) *Documentation of the appeal conference.* The appeal conference is an informal proceeding, intended to provide clarifications and explanations of the administrative record for the RO and the division engineer; it is not intended to supplement the administrative record. Consequently, the proceedings of the conference will not be recorded verbatim by the Corps or any other party attending the conference, and no verbatim transcripts of the conference will be made. However, after the conference, the RO will write a memorandum for the record (MFR) summarizing the presentations made at the conference, and will provide a copy of that MFR to the division engineer, the appellant, and the district engineer.

(8) *Appellant costs.* The appellant will be responsible for his own expenses for attending the appeal conference.

(e) *Basis of decision and communication with the RO.* The appeal of a permit denial or a declined individual permit is limited to the information contained in administrative record by the date of the NAP for the application, the proceedings of the appeal conference, and any relevant information gathered by the RO as described in § 331.5 of this Part. Neither the appellant nor the Corps may present new information not already contained in the administrative record, but both parties may interpret, clarify or explain issues and information contained in the record.

(f) *Applicability of appeal decisions.* Because a decision to deny or condition a permit depends on the facts, circumstances, and physical conditions particular to the specific project and site being evaluated, appeal decisions would be of little or no precedential utility. Therefore, an appeal decision of the division engineer is applicable only to the instant appeal, and has no other precedential effect. Such a decision may not be cited in any other administrative appeal, and may not be used as precedent for the evaluation of any other permit application. While administrative appeal decisions lack precedential value and may not be cited by an appellant or a district engineer in any other appeal proceeding,

the Corps goal is to have the Corps regulatory program operate as consistently as possible, particularly with respect to interpretations of law, regulation, an Executive Order, and officially-promulgated policy. Therefore, a copy of each appeal decision will be forwarded to Corps Headquarters; those decisions will be periodically reviewed at the headquarters level for consistency with law, Executive Orders and policy. Additional official guidance will be issued as necessary to maintain or improve the consistency of the Corps' appellate and permit decisions.

§ 331.8 Timeframes for final appeal decisions.

The Corps will make a final decision on the merits of the appeal at the earliest practicable time, in accordance with the time limits set forth below. The administrative appeal process is initiated by the receipt of an RFA by the division engineer. The Corps will review the RFA to determine whether the action is appealable. If the division engineer determines that the action is not appealable, the division engineer will notify the appellant accordingly within 30 days of the receipt of the RFA. If the division engineer determines that the action is appealable and the RFA is complete, the RO will request the administrative record from the district engineer. The division engineer will make a final decision on the merits of the appeal within 90 days of the receipt of the complete RFA.

§ 331.9 Final appeal decision.

(a) In accordance with the authorities contained in § 331.3(b), the division engineer will make a decision on the merits of the appeal. While reviewing an appeal and reaching a decision on the merits of an appeal, the division engineer can consult with or seek information from any person, including the district engineer.

(b) The division engineer will disapprove the entirety of or any part of the district engineer's decision only if he determines that the decision on some relevant matter was arbitrary, capricious, an abuse of discretion, not supported by substantial evidence in the administrative record, or plainly contrary to a requirement of law, regu-

lation, an Executive Order, or officially-promulgated Corps policy guidance. The division engineer will not attempt to substitute his judgment for that of the district engineer regarding a matter of fact, so long as the district engineer's determination was supported by substantial evidence in the administrative record, or regarding any other matter if the district engineer's determination was reasonable and within the zone of discretion delegated to the district engineer by Corps regulations. The division engineer may instruct the district engineer on how to correct any procedural error that was prejudicial to the appellant (i.e., that was not a "harmless" procedural error), or to reconsider the decision where any essential part of the district engineer's decision was not supported by accurate or sufficient information, or analysis, in the administrative record. The division engineer will document his decision on the merits of the appeal in writing, and provide a copy of this decision to the applicant (using certified mail) and the district engineer.

(c) The final decision of the division engineer on the merits of the appeal will conclude the administrative appeal process, and this decision will be filed in the administrative record for the project.

§ 331.10 Final Corps decision.

The final Corps decision on a permit application is the initial decision to issue or deny a permit, unless the permittee submits an RFA, and the division engineer accepts the RFA, pursuant to this Part. The final Corps decision on an appealed action is as follows:

(a) If the division engineer determines that the appeal is without merit, the final Corps decision is the district engineer's letter advising the applicant that the division engineer has decided that the appeal is without merit, and confirming the district engineer's initial permit decision; or

(b) If the division engineer determines that the appeal has merit, the final Corps decision is the district engineer's decision made pursuant to the division engineer's remand of the appealed action. The division engineer